BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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AUG 27 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Promotion of Competitive Networks in	)	
Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking to	)	
Amend Section 1.4000 of the Commission's Rules	)	
to Preempt Restrictions on Subscriber Premises	)	
Reception or Transmission Antennas Designed To	)	
Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making and	)	
Amendment of the Commission's Rules	)	
to Preempt State and Local Imposition of	)	
Discriminatory And/Or Excessive Taxes	)	
and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

COMMENTS OF TELIGENT, INC.

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August 27, 1999

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SUMMARY

- Many business and residential consumers in the United States are unable to enjoy the benefits of telecommunications competition because of unreasonable restrictions that are placed on telecommunications carrier access to MTEs. Market forces are not working sufficiently to remedy the problem and the Commission's intervention is warranted.

- The Communications Act provides the Commission with several bases of authority to provide nondiscriminatory telecommunications carrier access to consumers in MTEs.

- The Commission should conclude that the terms of access in Section 224 apply to the conduit and rights-of-way that utilities own or control within and on top of MTEs. Section 224's access requirements should expressly permit and require the expansion of existing utility rights-of-way over private property to accommodate technological advancements. Barring a written agreement to the contrary, it should be presumed that a utility possesses the right to occupy any spaces within or on top of MTEs to which access would be reasonably necessary in order to provide service using any one of the variety of distribution technologies available now or in the future.

- The Commission's rules implementing Section 224 do no not apply in 19 States that have certified to the Commission that they regulate pole attachments. Given the substantial alterations to Section 224 accomplished by the 1996 Telecommunications Act, the Commission should require re-certification by those States that certified prior to passage of the 1996 Telecommunications Act, and should look behind those certifications to ensure that Section 224 is interpreted and enforced to provide nondiscriminatory access to utility conduit and rights-of-way within and on top of MTEs.

- The decisions in the Commission's Over-the-Air Reception Devices proceeding do not foreclose the Commission from requiring nondiscriminatory telecommunications carrier access to MTEs in the instant proceeding. The underlying factual circumstances in the two proceedings differ materially. The Commission can and should encompass fixed wireless carriers within the scope of Section 207 and should extend that decision to permit access to common areas, such as rooftops. Such a finding would be fully consistent with Section 332(c)(7) of the Communications Act.

- The Commission retains both subject matter and *in personam* jurisdiction over MTE owners sufficient to require nondiscriminatory telecommunications carrier access to MTEs. The Commission should exercise this authority to ensure that consumers in MTEs have access to competitive telecommunications options.

- The Commission can and should require ILECs to make available to telecommunications carriers on an unbundled basis intra-MTE wiring from the entrance facilities to the demarcation point (and, separately, require ILECs to permit direct CLEC loop interface with the ILEC NID) as a network element pursuant to Section 251(c)(3). This approach is technically feasible as demonstrated by its ongoing practice in several different jurisdictions.

- A nondiscriminatory MTE access requirement does not amount to a taking. The takings analysis is properly conducted pursuant to the *Penn Central* analysis for regulatory takings

rather than pursuant to the *Loretto per se* approach because a nondiscrimination requirement would not require a mandated initial physical invasion of private property. Rather, once MTE owners had opened their properties to telecommunications carriers, it would apply nondiscrimination requirements to those practices. Such an approach is consistent with Commission and judicial precedent. An analysis of nondiscriminatory access requirements under the *Penn Central* analysis demonstrates that such requirements do not amount to a taking.

- A nondiscriminatory MTE access requirement may be viewed as a valid and limited waiver of the MTE owner's Fifth Amendment rights in exchange for the Commission's forbearance from full regulation of MTE owners as persons engaged in wire and radio communication.

- Even if the *Loretto* analysis were pursued and nondiscriminatory MTE access was deemed a taking, it would remain constitutional insofar as the Commission's rules permit just compensation to be paid by the telecommunications carrier to the MTE owner in exchange for access.

- An overly broad interpretation of the *Bell Atlantic v. F.C.C.* decision threatens to swallow much of the Commission's jurisdiction (indeed, it has never been followed to limit an agency's jurisdiction in the same manner). A party's mere claim that Commission action would amount to a taking cannot be sufficient to eliminate the Commission's authority to act. The *Bell Atlantic* case is readily distinguishable from the nondiscriminatory MTE access context. The Commission should recognize the very different circumstances underlying nondiscriminatory telecommunications carrier access to MTEs and acknowledge that the *Bell Atlantic v. F.C.C.* decision is not controlling in this matter.

- The Commission should permit an informal reverse preemption mechanism for rules governing nondiscriminatory telecommunications carrier access to MTEs so that States with adequate rules governing such access (as well as adequate enforcement mechanisms) can regulate the matter themselves. The Commission's authority would remain to protect consumers in those States lacking adequate nondiscriminatory MTE access rules. Such an approach is similar to the mechanism established by Section 224.

- Enforcement of nondiscriminatory MTE access requirements could follow the model of the Commission's expedited pole attachment complaint procedures.

- The Commission should require that the demarcation point in *all* MTEs be located at the minimum point of entry to facilitate facilities-based carrier access to customers without necessitating reliance on the ILEC's facilities.

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COMMENTS OF TELIGENT, INC.

Teligent, Inc. ("Teligent") hereby submits its comments in the above-captioned proceeding.[1]

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[1] Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217 and CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry in WT*

I. INTRODUCTION

Less than a year ago, the United States Government rightly recognized the critical importance of building access to telecommunications competition in recommending that the Government of Japan institute requirements for nondiscriminatory telecommunications carrier access to multi-tenant buildings to promote telecommunications competition in Japan. Now, Teligent applauds the Commission's recognition that the time has come to institute such requirements in the United States.

The 1996 Telecommunications Act seeks to overcome the legacy of telecommunications monopoly and increase the well-being of all Americans by fostering competition. This rulemaking represents a significant turning point -- the necessary next stage of opening local markets to facilities-based competition. The Commission's actions in this rulemaking will play an extraordinarily critical role in determining whether and when Congress' goals will be achieved and consumers will reap the benefits of facilities-based telecommunications competition. The Commission has the tools it needs to meet this challenge and, after carefully weighing the numerous interests at play, must act to the full extent of its authority and without reservation. Once it does so, the Commission's actions in this rulemaking will be viewed as one of the key events that enabled the competitive benefits that Americans justifiably expect and anticipate to be reaped. By contrast, the failure to act boldly will further stifle the progress of competition, delaying the arrival of choice for many consumers, and reducing the likelihood that some consumers will ever enjoy the benefits of competition that the 1996 Act anticipated.

Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141 (rel. July 7, 1999)("Notice").

Today, Teligent is pleased that the owners of literally thousands of multi-tenant buildings can honestly say that they have negotiated arrangements that permit competitive telecommunications carriers to have access to their buildings. In fact, Teligent has worked very hard with landlords to secure MTE access and recently announced that it has raised its multi-tenant building access projections, planning to secure access to approximately 6,000 multi-tenant environments ("MTEs") by year's end rather than the 5,000 originally forecasted.[2] While this news will help Wall Street adjust models it has created of Teligent's performance, public policy makers should not take too much comfort from these numbers or Teligent's incrementally higher projections brought about through great effort -- there are approximately 750,000 office buildings in the country today, and the number continually grows. Moreover, nearly one-third of all Americans live in multi-tenant environments. The Commission plainly cannot and should not rely on the fact that CLECs have gained access to a small fraction of this country's MTEs and that certain property owners have voluntarily embraced this policy as evidence that no further action on the Commission's part is necessary. That would be akin to thinking interconnection issues required little Commission attention because some interconnection had taken place. Indeed, the adoption of the Notice alone is indicative of the Commission's recognition that to accelerate facilities-based competition beyond its present state, it cannot take the view that "there is nothing we can do about this problem."

That is why Teligent is so heartened by this Notice. It reflects a wealth of knowledge, a reasoned analysis, and the true vision necessary to ensure that Americans working and living in MTEs will be able to receive the benefits of telecommunications competition. Teligent endorses

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[2] See Communications Daily at 8 (Aug. 13, 1999).

the Commission's recognition of the MTE access problem and the proposed solutions thereto. Once these solutions are implemented, MTE access will no longer represent an unregulated bottleneck capable of depriving consumers of the benefits of the 1996 Telecommunications Act.

II. THE COMMISSION HAS RECOGNIZED THAT FACILITIES-BASED TELECOMMUNICATIONS PROVIDERS OFFER THE GREATEST LONG-TERM BENEFITS TO CONSUMERS.

Teligent concurs with the Commission's view that

> the most substantial benefits to consumers will be achieved through facilities-based competition, because only facilities-based competitors can break down the incumbent LECs' bottleneck control over local networks and provide services without having to rely on their rivals for critical components of their offerings. Moreover, only facilities-based competition can fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing.[3]

Unquestionably, *all* entry strategies -- including resale and UNE-based strategies -- offer benefits to consumers. But only facilities-based entry strategies offer the full panoply of benefits to consumers -- reduction in prices, enhanced quality of service, innovative service offerings, and use of the most cutting-edge technologies -- without relying heavily on the incumbent's willingness to permit these results. Thus, wherever the Commission has the ability to eliminate existing obstacles to the construction and operation of competitive facilities-based networks, it should do so. Restrictions on nondiscriminatory MTE access are a very significant obstacle, as this Notice suggests, and Teligent supports the Commission's efforts.

As a facilities-based provider, Teligent provides the Commission first-hand experience of what true facilities-based competition can and does accomplish for consumers. Teligent offers

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[3] Notice at ¶ 4.

increased bandwidth for high-speed data applications that would otherwise be too slow over copper wire, such as multiple Internet connections (up to 100 times faster than a dial-up connection with unlimited online time), videoconferencing, and the capability to transfer large data files in seconds. Teligent can provide connections at many times the speed of technologies such as xDSL. Teligent also offers several web hosting solutions.

Its high quality services are offered at a substantial savings to customers.[4] Teligent's network structure allows it to realize significant savings which are passed directly to the customer. Teligent can save customers up to 30% off their local telephone and Internet service and provide substantial savings for long distance service. In addition, for customers who desire a turnkey package (for example, companies without communications managers and staffs), Teligent will provide Internet access, local loop, customer premises equipment (router, CSU/DSU) and installation to a customer's location for one low monthly fee.

Teligent's initial marketing plans are directed towards small and medium-sized businesses, bringing advanced telecommunications capabilities and services over "new last miles" to consumers who might otherwise not have access to them. Teligent gives these companies across the country the power, service, and savings for their communications needs that the largest businesses have enjoyed for years. Most of the MTEs in which Teligent provides fixed wireless service today do not have access to fiber because they are outside the central business districts where fiber often has been installed.

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[4] Teligent provides local, long distance, and international telephone services, offering traditional analog lines and trunks, as well as digital, T-1s, expanded calling areas, conference calling, voice mail, and custom calling features such as caller ID, call forwarding, priority ringing, and three-way call transfer.

Teligent's antennas will ultimately permit variances in network transmission capacity, or scalability, so that the bandwidth used by customers will increase or decrease in accordance with the needs of a particular application. This capability, known as dynamic bandwidth allocation, avoids waste and maximizes efficient spectrum utilization by allowing Teligent's service to grow as a customer's communications needs grow. Customers who do not need the maximum bandwidth can avoid paying for it, yet once that customer's communications needs grow, Teligent will be able to increase its bandwidth to accommodate the customer's addition of more lines or data-intensive applications (such as Internet and videoconferencing). This feature is particularly attractive to small and medium-sized companies.

Teligent also offers its customers state-of-the-art electronic billing services. Today, most telecommunications customers receive paper bills with a multitude of pages and inserts. A more efficient and exciting new way to make bills more accessible and understandable for customers is through electronic billing. By providing the customer with an electronic bill, a telecommunications carrier can provide instantaneous access to important information on a real-time basis enabling customers to verify service charges and fees on a daily or even more frequent basis; to sort calls by location or account code; to perform cost analyses; and to monitor the number and length of calls to certain locations. Teligent can provide these consumer benefits -- previously enjoyed only by large companies -- because it constructs and operates its own facilities.

Teligent and other traditional fixed wireless carriers such as Nextlink and WinStar have a history of pursuing a fixed wireless strategy.[5] AT&T's "Project Angel" envisions wireless local

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[5] See, e.g., Peter Haynes, "Teligent's Test," Forbes Magazine (March 9, 1998)(noting the cost advantages and unique challenges of Teligent's wireless local loop strategy).

loop bypass of the incumbent bottleneck.[6] In addition, Sprint recently announced its acquisition of an MMDS operator that will enable it to bypass BOC local loops to deliver broadband services to consumers.[7] Similarly, MCI WorldCom has acquired wireless cable operators to provide Internet access and other services without reliance on incumbent networks.[8] Given the importance of MTE access to wireless local loop strategies, and the trend towards such strategies, the growth of facilities-based local exchange competition will directly correlate to the level of available telecommunications carrier access to tenants in MTEs.

Access to MTEs is critical for the development of facilities-based competition everywhere (even outside the MTE marketplace). MTEs offer a geographically-concentrated group of potential customers, therefore it is natural for new entrants with limited capital initially to pursue these lines of business that typically produce higher revenue and margins.[9] Inevitably this will

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6 See Rebecca Blumenstein, "AT&T Plans to Enter Some Areas Using 'Fixed Wireless' Technology," The Wall St. J. at B6 (March 19, 1999)(noting AT&T's strategy to used fixed wireless technology to provide local service where it is unable to use cable television lines).

7 See Nicole Harris, "Sprint to Acquire People's Choice TV In Broadband Bid," The Wall St. J. at B6 (April 13, 1999)(reporting Sprint's purchase of an MMDS provider so that it can offer high-speed Internet access and video conferencing over wireless technology instead of purchasing BOC loops).

8 See "Shopping for Wireless," Communications Today (March 31, 1999)(reporting MCI WorldCom's purchase of $200 million debt purchase from cable wireless providers in a bid that would allow the company to offer local service without having to buy access from incumbent LECs). Moreover, the winners of the first and second LMDS auction will also be constructing their networks and will be dependent on nondiscriminatory access to MTEs as will the new winner of the soon-to-be-held 39 GHz auction.

9 Indeed, MCI's tremendous success in the long distance market began with a geographically-limited and business-oriented plan. Its success in serving all Americans -- residential and commercial in urban, suburban, and rural areas -- is self-evident and is a product both of its targeted initial business plan and the Commission's foresight that allowed this growth to occur.

change, as CLECs' success in MTEs will provide the earnings necessary to fund competitive entry in other areas. Moreover, as the number of consumers taking service from competitors increases, the cost of procuring equipment will decline. The economies inherent in the growth of competition will allow the competition born in suburban and urban commercial environments to expand rapidly to suburban, rural, and residential environments. Because the competitive growth curve for many CLECs begins with MTEs, CLEC access to consumers in MTEs is a condition precedent to the development of telecommunications competition in all parts of the country.

Access to MTEs is important to *all* facilities-based CLECs, wireline and fixed wireless alike. While fiber-based carriers need access from the ground, fixed wireless carriers need access to the roof. It is often overlooked, however, that the construction of fixed wireless networks typically is far less expensive than construction of their wireline counterparts, and does not involve the inconvenience to local governments (and their citizens) of digging up streets to install facilities. Moreover, construction of fixed wireless networks can be accomplished more quickly (lowering time-to-service) than construction of wireline networks. For these reasons, fixed wireless technology has developed into an increasingly attractive method of bypassing the incumbents' local loops to provide competitive telecommunications and advanced services.

III. BARRIERS TO MTE ACCESS LEAVE MANY AMERICANS WITHOUT A CHOICE IN TELECOMMUNICATIONS CARRIERS.

Restrictions on telecommunications carrier access to MTEs rank among the most formidable obstacles to facilities-based competition. Many MTE owners understand that the presence of competitive telecommunications carriers in the building is of such value to tenants in the MTE that it enhances the value of the building. These owners willingly enter into negotiations with Teligent (and other CLECs) to facilitate the availability of competitive telecommunications options for their tenants. As noted above, Teligent expects to have gained access to over 6,000 MTEs by year's end and will have done so entirely pursuant to voluntary negotiations.

By contrast, the largest group of MTE owners respond slowly to CLEC requests for MTE access or initially seek unreasonable terms, thereby delaying access for several months or even years. Some MTE owners even deny access entirely, or largely ignore requests for access. Others impose such burdensome conditions on, or charge such exorbitant rates for, MTE access that providing competitive services to the MTE is rendered impossible or uneconomic. Teligent's litany of some of its most egregious examples of barriers to nondiscriminatory MTE access have been included in, and consolidated with, accounts of numerous other CLECs in the comments also filed this day by the Association for Local Telecommunications Services. While the specific examples of the MTE access issues that Teligent faces on a daily basis are contained in the ALTS comments, the types of issues can be summarized broadly as follows:

- Tenants have requested Teligent's service and even sought access for Teligent directly from the landlord, and still the landlord denies Teligent access.
- Many landlords are of the view that the access fees that Teligent can offer are too low to make negotiations worth their time. With no interest in negotiation, MTE owners inform Teligent that they simply have no interest in permitting competitive facilities-based telecommunications carriers to serve tenants in the building.

- MTE owners demand thousands of dollars in monthly fees in exchange for Teligent's access to the MTE.
- MTE owners demand that Teligent provide free services or transfer its ownership of installed facilities to the MTE owner in exchange for access.
- MTE owners with properties in several different States threaten to exclude Teligent from MTEs in those States without nondiscriminatory MTE access requirements if Teligent insists on enforcement of its nondiscriminatory MTE access rights in States that have such requirements.

Despite the vigorous efforts of many CLECs since the passage of the 1996 Telecommunications Act and the struggle to overcome these obstacles, the time has come to finally recognize that the market is not resolving the problem and will not and cannot do so anytime soon for many reasons. Commission intervention is necessary to advance a public interest obligation. In this manner, the Commission assumes a role analogous to that assumed by the Department of Justice and the Federal Trade Commission in antitrust and consumer protection matters.[10]

Why is it not sufficient to leave this matter solely to the States? Indeed, certain States have already recognized the criticality of this issue to competition as will be discussed in further detail below. The answer is clear -- many MTE owners and management companies are quite large, holding or controlling MTEs nationwide in different jurisdictions. Because these companies' holdings extend across various jurisdictions, no single State has the capacity to address the unreasonable behavior in a comprehensive fashion.[11] The Commission alone has the

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10 See, e.g., Neil W. Averitt and Robert H. Lande, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law," 65 Antitrust L.J. 713, Spring 1997 (explaining that "antitrust law can best be understood as a way of protecting the variety of consumer options in the marketplace" and that "consumer protection cases are explicable as a means of safeguarding the ability of consumers to choose among the options that the market provides").

11 In some cases, if a carrier exercises its rights under the building access laws of a particular State (e.g., in Texas), nationwide property management companies can penalize the carrier

capability to prevent these companies from unilaterally denying access to competitive telecommunications carriers for large numbers of tenants at once or exerting undue market power in negotiations with carriers.

The Commission needs to exercise this capability because tenants often lack the unilateral power to secure access to telecommunications options. The argument that all a tenant need do is move to another location belies the economic realities of commercial tenancy. The effect of long-term leases -- typically found in commercial environments -- renders tenants without recourse to market influences.[12] Moreover, many of these leases were entered into prior to the advent of local competition, so provisions protecting the tenant's right to choose its telecommunications carrier were not often contemplated. To obtain choice in telecommunications carriers and services, these tenants now must break their leases and move -- incurring substantial expenses and disruption of their lives and businesses in doing so. This is an unreasonable pre-condition to realize the benefits of the competition envisioned by the 1996 Act. Not only are there moving expenses, but often the consumer will face a higher rent on a new lease given the strength of the real estate and general economy. Finally, small and medium-sized tenants, for the most part, have never experienced these competitive telecommunications services, so the idea that they would, in significant numbers, break a lease and incur all of the other identified costs, is unrealistic to assume and unreasonable to expect.

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in other States without building access laws (thereby undermining the effect of State-by-State resolution of the building access problem).

12 Cf. United States v. General Dynamics Corp., 415 U.S. 486, 501 (1974)(explaining that the ability of market participants to wield competitive influence in the marketplace is reduced or eliminated by their participation in long-term requirements contracts).

Indeed, the 1996 Act's number portability requirement is premised on an analogous proposition. Prior to enactment of the number portability requirement, customers could switch local exchange providers so long as they were willing to switch their telephone numbers too -- an expensive and inconvenient undertaking, but certainly one much less inconvenient than a physical relocation. Congress believed that the inability to retain one's telephone number when switching carriers presented an extraordinary, often insurmountable impediment to local competition and that customers should not have to choose between their telephone number and competition.[13] The same philosophy requires that customers should not have to choose between the benefits of local competition and maintaining their present physical location.[14] Congress did not intend and the Commission should not accept an argument that requires incumbents merely to persuade customers to choose their service while requiring CLECs to find customers that are such zealots that they will threaten to or actually move into another building to secure competitive service from the CLEC.

So too, the more general proposition that market forces demand landlords to cater to tenant wishes is flawed. While the Commission has recognized contentions by real estate interests

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13 See, e.g., H.R. Rep. No. 104-204, pt. 1, at 72 (1995)("The ability to change service providers is only meaningful if a customer can retain his or her local telephone number."). Similarly, as the Notice recognizes, "[t]he Commission has a long history of concern that all customers have access to their choice of communications service providers in competitive markets. For example, in the 1980s we imposed equal access obligations on LECs, including presubscription and dial-around requirements, in order to ensure consumer choice of interexchange service providers." Notice at ¶ 32 (citing MTS and WATS Market Structure, CC Docket No. 78-72, Phase III, *Report and Order*, 100 FCC2d 860 at ¶¶ 14-65 (1983)).

14 Choice in telecommunications carriers remains a relatively new phenomenon for most consumers. Given that many consumers do not yet fully comprehend the benefits that competition can bring them, it is unlikely that they will possess the zeal for competitive choices sufficient to warrant consideration of moving locations.

that "a dynamic market for access to buildings is evolving and that building owners have good reason to afford their tenants the services they want,"[15] Teligent's experience demonstrates that landlords frequently ignore their tenants' wishes. Landlords, who may have little or no economic incentive to comply with the telecommunications choices of an individual or small business tenant in their buildings, should not have the ability to interpose their choice of telecommunications provider by denying would-be competitive providers access to their buildings.

Finally, the costs of breaking a lease and the inconvenience and disruption of moving may simply be too high for many individuals and small to medium sized businesses. The economic description of this phenomenon is the "lock-in" effect and it impairs natural market adjustments. That this "lock-in" effect is a current reality is verified by BOMA itself in its effort to argue that building owners should not have to bear the maintenance costs of riser cable in multi-unit buildings. As a Commission Order notes, BOMA has asserted that "many tenants have long term leases that will prevent building owners from passing on [the] additional costs [of riser maintenance] to their tenants."[16]

The lock-in effect, a concept well-grounded in legal and economic precedent, was addressed by the Supreme Court in its 1992 *Kodak* decision.[17] Kodak was charged with seeking

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15 Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, *Report*, FCC 99-5 at ¶ 103 (rel. Feb. 2, 1999)("Advanced Services Report").

16 Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 97-209 at ¶ 25 (rel. June 17, 1997)(emphasis added).

17 Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451 (1992).

to impose high service costs on purchasers of its copier equipment who were locked into long-term service agreements. The Court noted consumers' lack of information about better deals, and stated that "even if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive."[18] Although some sophisticated customers may be able and willing to assume the costs of the requisite information gathering and processing, the Court noted that

> [t]here are reasons . . . to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too . . . . [I]f a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.[19]

Even those customers with sufficient information may suffer uneconomic exploitation from the lock-in effects. As the Court observed,

> [i]f the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in," will tolerate some level of service-price increases before changing equipment brands.[20]

The economic concept of "lock-in" effects also was part of the explanation for the Department of Justice's insistence on a phase-out period for the 1956 IBM consent decree; the Department sought, among other things, to ensure that any mainframe users who wanted to switch computer platforms due to termination of the decree could do so over time since their enormous software investment would leave them "locked-in" for years to IBM.

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18 Id. at 474.

19 Id. at 475.

20 Id. at 476.

The situation described by the Supreme Court in *Kodak* is closely analogous to that of small and mid-size commercial tenants in long-term leases who wish to take local telephone service from a competitor. Many tenants entered into existing leases before true competitive choices in telecommunications were a viable option and had no way of knowing that these choices would become available. Although it is possible that a few sophisticated customers may have negotiated or renegotiated lease terms to provide for competitive telecommunications choice, most smaller businesses and individuals certainly have not realized the benefits of the renegotiated leases of a few sophisticated customers, particularly due to an MTE owner's ability to discriminate among tenants with respect to lease terms and conditions. In light of this market failure, Commission intervention is warranted to ensure that all tenants in MTEs are given the freedom to choose their telecommunications carrier.

This course of action is consistent with recent Commission intervention in other contexts where market incentives have proven inadequate to achieve required or socially beneficial goals on the necessary scale and consumers are ill-served.[21] Adoption of nondiscriminatory MTE access rules to protect consumers in multi-tenant environments would operate in a similar fashion.

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21 A recent example involves telecommunications carrier billing practices. Carriers have market incentives to satisfy their customers and many carriers operate in the expected fashion. However, some carriers engage in billing practices that lead to customer confusion and surprise at the payments that they are required to make for telecommunications service. Some entities use the confusing nature of bills to engage in fraud. See Truth-in-Billing and Billing Format, CC Docket No. 98-170, *Notice of Proposed Rulemaking*, FCC 98-232 at ¶ 3 (rel. Sept. 17, 1998). These practices disserve consumers and led the Commission to adopt truth-in-billing practices. See Truth-in-Billing and Billing Format, CC Docket No. 98-170, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-72 (rel. May 11, 1999). The Commission's new billing rules are designed to ensure that consumers are able to easily understand their telephone bills and are well-served by their carriers in that regard. Id.

IV. THE COMMISSION MUST TAKE AFFIRMATIVE STEPS TO ENSURE THAT CONSUMERS IN MTES HAVE ACCESS TO THEIR TELECOMMUNICATIONS CARRIER OF CHOICE CONSISTENT WITH THE GOALS OF THE 1996 TELECOMMUNICATIONS ACT.

In order to promote widespread access to the benefits of telecommunications competition, the Commission must ensure that telecommunications carriers not only receive access but also that such access is nondiscriminatory at reasonable rates and equitable terms and conditions. In other words, MTE owners that permit access to their premises to any provider of telecommunications service (i.e., the incumbent LEC) should be required to make access available to all such providers under similar rates, terms, and conditions. The technology utilized by a particular carrier should not be used as a means for exclusion. For example, a fixed wireless CLEC should not be denied MTE access due to the need to place a small and unobtrusive antenna on an MTE rooftop nor should a fiber-based carrier be denied access due to the need to run fiber under the parking lot of an MTE. To that end, the Commission's MTE access rules should expressly include all types of CLEC technologies.

CLECs are not advocating access, however, without fair compensation and reasonable accountability. Indeed, in exchange for granting access, telecommunications carriers must be required to indemnify MTE owners for any damage done to the property that is not the fault of the MTE owner occurring as a result of installation, maintenance, operation, or removal of the carrier's telecommunications equipment. In addition, MTE owners should be permitted to demand and receive reasonable compensation in exchange for access (insofar as such fees are assessed on a nondiscriminatory basis). MTE owners must also be permitted through reasonable and nondiscriminatory means to preserve the security and safety of the MTE and its occupants.

Finally, legitimate and demonstrable space constraints should relieve the MTE owner of access obligations.[22]

As a matter of policy and law, the Commission must prohibit exclusive access contracts between telecommunications carriers and MTE owners.[23] Exclusive access contracts remove choice from the consumer and eventually adversely impact service quality, rates, and innovation since an exclusive carrier lacks the threat of competition within the MTE thereby removing the incentive to provide quality service. The 1996 Telecommunications Act was premised upon the principle that telecommunications competition will promote the interests of all consumers. Allowing exclusive contracts within MTEs would violate this central tenet of the 1996 Act. It is notable that *every* State addressing the MTE access issue thus far has prohibited exclusive access arrangements between carriers and MTE owners.[24]

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22 The Texas policy and Connecticut rules could be used as a guide for the Commission in implementing its own rules. These are particularly favorable exemplars because despite the existence of MTE access statutes in both States since 1995 and 1994, respectively, no court challenges to the rules (or the underlying statutes) have been made.

23 Section 224's nondiscriminatory requirements preclude all LECs -- incumbent and competitive alike -- from entering into exclusive access arrangements with MTE owners. Exclusivity would otherwise prevent operation of Section 224's access to intra-MTE conduit on a nondiscriminatory basis for all telecommunications carriers.

24 See Informal Dispute Resolution, Project No. 18000 *Memorandum from Ann M. Coffin, et al. to Chairman Pat Wood, III, et al.* at 7 (Tex. PUC, Oct. 29, 1997)(subsequently adopted by the Texas Public Utility Commission); Conn. Gen. Stats. § 16-2471(e); In the Matter of the Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 86-927-TP-COI, *Supplemental Finding and Order*, 1994 Ohio PUC LEXIS 778 at *20-21 (Ohio PUC Sep. 29, 1994); In the Matter of the Commission, on its own motion, to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers, Application No. C-1878/PI-23, *Order Establishing Statewide Policy for MDU Access*, slip op. at 6 (Neb. PSC, March 2, 1999); Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own

The Commission seeks comment on the argument that exclusive contracts provide small companies with the requisite market share to make service to the MTE economic or otherwise permit a carrier to recoup its investment in the MTE.[25] These arguments are simply variations on the positions traditionally advanced by incumbents resistant to competitive entry. As noted above, adherence to these positions would run contrary to the overriding principle of competition inherent in the 1996 Act. Moreover, although serving a particular MTE on a non-exclusive basis may appear to be uneconomic for some weak competitors, allowing exclusive contracts eliminates the possibility (and incentive) that new economic means of serving the MTE on a non-exclusive basis would develop. In sum, a carrier's exclusive presence in an MTE should be the result of superior service to the consumers therein, not the result of contractual arrangements with the MTE owner.

There are several other reasons not to permit landlords to engage an exclusive provider. First, there is no reason to believe that the landlord is better positioned to know and understand the telecommunications needs of tenants than are tenants. Second, not all tenants possess the same needs -- the right choice for one may well be the wrong choice for another. Third, it is quite likely that the landlord's choice of exclusive providers will be driven by what is the best offer to the landlord, not to the tenants. If tenants want only one provider, they should be able to choose

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Motion Into Competition for Local Exchange Service, R. 95-04-043; I.95-04-044, *Decision 98-10-058*, slip op. at 100 (Cal. PUC Oct. 28, 1998); see also "Report on Access by Telecommunications Companies to Customers in Multitenant Environments," Special Project No. 980000B-SP, Vol. 1 at 31 (Fla. PSC Feb. 1999)(report to Florida legislature recommending prohibition of exclusionary access contracts as against public policy).

25 Notice at ¶ 61.

that provider. Locking out competitors because tenants would otherwise want to choose them is wrong.

V. ALL FACETS OF THE TELECOMMUNICATIONS INDUSTRY SUPPORT NONDISCRIMINATORY MTE ACCESS.

In various fora, not only CLECs, but ILECs as well as property owner representatives have expressed support for a legal requirement for telecommunications carrier access to tenants in MTEs on reasonable terms.

- ***BOMA***: BOMA Florida President Bert Locke sent Florida State Senator John McKay a letter urging passage of pending bills in Florida that required MTE owners to allow telecommunications carrier access to MTEs for the purpose of serving the tenants therein. In that letter, Mr. Locke stated that "[o]ver the past six weeks or so, BOMA and other trade association groups of the real estate industry, including the International Council of Shopping Centers, National Apartment Association, Institute of Real Estate Management, National Association of Industrial Office Parks, and Communication Association Institute International, just to name a few, . . . have negotiated a mutually acceptable compromise bill in the form of current versions of SB 1008 and HB 1135. While not perfect from BOMA's perspective, we do feel that this legislation is in the best interests of all parties involved and will assist in the promotion of competition for the services of the formerly monopolistic, incumbent local exchange companies."[26]
- ***BellSouth***: Before the Florida Public Service Commission, BellSouth explained that "[t]elecommunications companies should have 'direct access' to customers" and that "[c]arriers should be free to choose the desired technologies used to deliver those services."[27] It went on to explain that if "a property owner has the authority to prevent a carrier from placing its facilities on the owner's property, then this authority is, in effect, a restriction to 'direct access.'"[28]
- ***GTE***: GTE has taken the position that "telecommunications companies should have direct access to tenants in a multi-tenant environment. The multi-tenant location owner manages access to an essential element in the delivery of telecommunications to the tenants, and telecommunications is essential to the public welfare. The owner should therefore be required

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26 Letter to Hon. John McKay, Florida Senate, from Bert J. Locke, Jr., President, BOMA Florida, dated April 22, 1999.

27 Access by Telecommunications Companies to Customers in Multi-Tenant Environments, Special Project No. 980000B-SP, *Positions of BellSouth Telecommunications, Inc.* at 1, 3-4 (Fla. PSC July 29, 1998).

28 Id. at 4.

to permit certified telecommunications companies access to space sufficient to provide telecommunications services to tenants."[29] It also noted that "[a]ny restrictions on direct access should be strictly constrained to reasonable security, safety, appearance, and physical space limitations"[30] and explained that "GTE does not believe that exclusionary contracts are ever appropriate."[31] It also stated that direct access to tenants in MTEs "is not an unconstitutional taking."[32] Similarly, before the Texas PUC, GTE stated that "[t]he building owner, by controlling building access, manages an essential element in the delivery of telecommunications to the tenants in that building."[33]

- ***Southwestern Bell Telephone Company***: Before the Texas PUC, Southwestern Bell aptly explained the problem with restrictions on MTE access: "[t]he higher the payment required of telecommunications providers, the less likely it is that tenants will see competitive choices."[34] Southwestern Bell also conceded the competitive advantage that incumbents enjoy with respect to MTE access. It explained that "certain facilities (*e.g.*, conduit cable and wiring) may have been placed by a telecommunications utility under an easement or other agreement between the utility and the property owner. Often, those facilities were placed at no charge because the building owner needed telephone service to the building and there was only one provider."[35]
- ***Sprint***: In Florida, where Sprint operates incumbent local networks, it stated that "[t]elecommunications carriers should have direct access to customers in multi-tenant environments . . . The public policy of the United States . . . includes the development of local exchange competition and giving consumers the power to choose between competing telecommunications carriers and the services they offer."[36] Sprint went on to explain that

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29 Access by Telecommunications Companies to Customers in Multi-Tenant Environments, Special Project No. 980000B-SP, *Comments of GTE Florida Incorporated* at 1 (Fla. PSC July 29, 1998).

30 Id. at 3.

31 Id.

32 Access by Telecommunications Companies to Customers in Multi-Tenant Environments, Special Project No. 980000B-SP, *Reply Comments of GTE Florida Incorporated* at 2 (Fla. PSC August 28, 1998).

33 Informal Dispute Resolution; Questions Regarding Rights of Telecommunications Utilities and Property Owners Under PURA Building Access Provision, Project No. 18000, *Comments of GTE Southwest Incorporated* at 2 (Tex. PUC Oct. 3, 1997).

34 Informal Dispute Resolution; Questions Regarding Rights of Telecommunications Utilities and Property Owners Under PURA Building Access Provision, Project No. 18000, *Southwestern Bell Telephone Company's Comments* at 4 (Tex. PUC Oct. 2, 1997).

35 Id. at 8.

36 Access by Telecommunications Companies to Customers in Multi-Tenant Environments, Special Project No. 980000B-SP, *Sprint Corporation's Positions on Issues* at 1 (Fla. PSC July 29, 1998).

"[t]his kind of competitive environment requires non-discriminatory equal access by certificated carriers at some point on or at the premises of an MTE. To allow otherwise would subordinate the interests of end user customers and the development of competitive local exchange markets to the landlords."[37]

- ***MCI WorldCom***: MCI told the Nebraska PSC that "[a]ll Nebraska customers should have access to competitive local exchange carrier services. Thus, no matter which incumbent local exchange carrier initially serves a particular apartment, building, campus, or business park, individual customers or tenants -- rather than the owner of the multiple dwelling units -- should be able to choose their local exchange carrier."[38] Similarly, WorldCom stated that "if competition is to develop in the multi-tenant environment, carriers must have direct access on a nondiscriminatory basis and without restrictions or limitations []."[39]
- ***AT&T***: In Texas, AT&T stated that "[p]roperty owners should be responsible for affording non-discriminatory access to their building to all telecommunications providers" and that "building owners should be required to provide new entrants with comparable rates, terms, and conditions as might already exist with incumbent LECs or other telecommunications providers."[40]

As evidenced from the examples above, building owners, incumbents, and new entrants alike, to varying degrees, have advocated or accepted the requirement that MTE owners permit telecommunications carriers MTE access in order to serve tenants in those MTEs. While some of these parties may take different positions with the Commission in this proceeding initially, it is important for the Commission to bear in mind that, when pressed, even the most ardent opponents

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37 Id. at 2.

38 In the Matter of the Commission, on its own motion, seeking to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers (CLECs), Application No. C-1878/PI-23, *Comments of MCI Telecommunications Corporation* at 1 (Neb. PSC Sep. 8, 1998).

39 Access by Telecommunications Companies to Customers in Multi-Tenant Environments, Special Project No. 980000B-SP, *Comments of WorldCom Technologies, Inc.* at 1 (Fla. PSC Aug. 26, 1998).

40 Informal Dispute Resolution; Questions Regarding Rights of Telecommunications Utilities and Property Owners Under PURA Building Access Provision, Project No. 18000, *AT&T Communications of the Southwest, Inc.'s Comments Regarding Published Questions* at 6, 13 (Tex. PUC Oct. 2, 1997).

of nondiscriminatory MTE access have ultimately been willing to accept that requirement in other fora.

VI. THOSE STATE PUBLIC UTILITY COMMISSIONS ADDRESSING THE MTE ACCESS ISSUE HAVE RECOGNIZED THAT MTE ACCESS AFFECTS THE DEVELOPMENT OF TELECOMMUNICATIONS COMPETITION.

As the Notice recognizes, several States have already responded to the need for nondiscriminatory telecommunications carrier access to MTEs.[41] In addition to the examples mentioned in the Notice, California and Nebraska have rules designed to promote competitive carrier nondiscriminatory access to tenants in MTEs,[42] and NARUC passed a resolution, only one year ago, urging regulatory commissions to adopt rules to address the need for nondiscriminatory telecommunications carrier access to MTEs.[43] Still, other State PUCs, while recognizing the value to local competition that could be achieved by MTE access requirements, question their jurisdiction to accomplish MTE access without legislation on point. For example, the Florida Public Service Commission conducted an intensive study of the issue, concluding that "[a]dopting

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41 Notice at ¶ 54.

42 Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service, R. 95-04-043; I.95-04-044, *Decision 98-10-058*, slip op. at 99-100 (Cal. PUC Oct. 28, 1998)(requiring that incumbents with vacant space in existing entrance facilities into commercial buildings make space available to competitors up to the MPOE and prohibiting exclusive access contracts with MTE owners); see also In the Matter of the Commission, on its own motion, to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers, Application No. C-1878/PI-23, *Order Establishing Statewide Policy for MDU Access*, slip op. at 5- 6 (Neb. PSC, March 2, 1999)(requiring ILEC to permit the demarcation point to be established at the MPOE upon request of a CLEC and prohibiting exclusive access or marketing arrangements between a telecommunications carrier and the building owner).

43 Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications Carriers, NARUC 1998 Summer Meeting, Seattle, Washington.

legislation which sets forth standards for reasonable, nondiscriminatory, and technologically neutral access would assist in resolving the controversies between the landlords and telecommunications service providers."[44] The Florida PSC believed that it lacked "authority over controversies pertaining to mandatory multitenant access without specific legislative authority."[45] Nevertheless, although the MTE access problem exists nationwide, the overwhelming majority of States have not even addressed the MTE access issue.

For those states that have, the effectiveness of their pro-competitive policies are often blunted by some MTE owners with properties in other States lacking access requirements. As noted in Section III above, these MTE owners can threaten retribution in States lacking access requirements if a telecommunications carrier exercises its access rights in the State that requires access. Accordingly, a federal nationwide approach is the most effective solution to this issue.

VII. THE COMMISSION RETAINS THE AUTHORITY TO ENSURE THAT CONSUMERS IN MTES HAVE ACCESS TO THEIR TELECOMMUNICATIONS CARRIER OF CHOICE.

The Notice correctly identifies the numerous sources of jurisdiction provided by the Communications Act to the Commission to act to fill the void. Rooftop and MTE access may be accomplished by taking as a whole the various pieces of jurisdiction contained within the Communications Act to arrive at a comprehensive nondiscriminatory MTE access rule that is

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44 "Report on Access by Telecommunications Companies to Customers in Multitenant Environments," Special Project No. 980000B-SP, Vol. 1 at 49 (Fla. PSC Feb. 1999).

45 Id. at 56. Despite the fact that property owner interests and telecommunications carriers reached a compromise agreement and presented the same to the Florida legislature, the bill was not presented by the Florida State Senate Rules Committee for a full vote. An article in the St. Petersburg Times reported that the Rules Committee Chairman, as a developer of shopping centers and office parks, had a strong personal stake in the matter and ignored the compromise position of the property owner interests. See Martin Dyckman, "Conflict of Interest? No Problem," St. Petersburg Times (Apr. 28, 1999). Similar parochial interests are likely to threaten the success of MTE access efforts in other States, as well.

legitimately derived from the Commission's authority found in several different provisions of the Act.

A. Section 224 Provides Direct Authority To Accomplish Nondiscriminatory MTE Access.

1. Utility Rights-Of-Way Are Essential Facilities.

The Commission tentatively concludes that Section 224's access provisions extend to utility conduits and rights-of-way that run through MTEs.[46] Teligent strongly supports this conclusion. Historically, utilities obtained their rights-of-way as a function of incumbency and monopoly. Through initial enactment of Section 224 and its extension in 1996 to telecommunications carriers, Congress sought to grant access to the rights-of-way that utilities enjoy as an advantage of incumbency. A broad perspective of the 1996 Act reveals a strategy designed to promote the development of telecommunications competition on the basis of service and rates rather than on advantages gained through monopoly control over facilities essential to the provision of service. Section 224, and the access to rights-of-way that it provides, assumes an important role in that design.[47]

It is important for the Commission to recognize the essential facility nature of utilities' rights-of-way. The historic monopoly status of the utilities allowed them to exercise the power, either unilaterally or through statutorily-granted eminent domain authority, to obtain rights-of-

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46 Notice at ¶ 44.

47 See United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988)("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme - because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law").